

- o In contrast to NYT's internal systems, the Web/GUI is not a real-time, on-line system. CLEC representatives must perform more functions than NYT representatives to retrieve the same information from, or to do the same work with, NYT's OSSs, causing CLECs additional delays and costs. Hou, p. 19; Spivy, ¶ 49; Tr. 433 (Nelson).
- o Use of the Web/GUI requires CLECs to perform double data entry. Information that CLEC representatives enter into, or receive from, the Web GUI is not automatically entered into the CLEC's own system. Thus, CLEC representatives must manually -- and separately -- enter the information into both the CLEC's system and NYT's system. Hou, pp. 21-22; Spivy, ¶ 56; Wajsglas, ¶ 12; Tr. 403-04 (Hou); Tr. 434 (Nelson).
- o CLECs are unable to enter repair trouble tickets into the Web/GUI. Tr. 388-89, 391 (Dailey); Tr. 460 (Miller).⁵⁰
- o Web/GUI users cannot access information on the status of installation orders. Wajsglas, ¶ 15. See also Tr. 411-12 (Spivy).
- o The due dates available on the Web/GUI are sometimes later than the due dates available directly from NYT's retail service center. The disparity can be as much as four business days. Spivy, ¶ 54; Tr. 410-11 (Spivy).
- o Orders placed through the Web/GUI can be viewed only by the customer representative who keyed in the order, not by other employees of the CLEC (including the supervisors of the representative). NYT's retail operation does not experience this problem. Spivy, ¶¶ 50-51; Wajsglas, ¶ 13; Tr. 435 (Nelson).⁵¹

⁵⁰At the conference, Mr. Miller stated only that this problem "is due to be fixed before the end of April." Tr. 460 (Miller). However, in the transcript "corrections" that it filed with the Commission on April 14, 1997, NYT has revised this estimate to "mid-May." In the meantime, CLECs must report problems to NYT by fax or by phone -- a cumbersome process. Tr. 388 (Dailey).

⁵¹NYT acknowledges this problem, but has only recently begun to take steps that might allow multiple access to orders. Even this procedure will take three months to complete. Tr. 484-85 (Miller).

These deficiencies demonstrate that the Web/GUI does not provide CLECs with the commercially reasonable OSS support required by the 1996 Act.

ii. EIF

NYT's EIF interface also does not provide commercially reasonable OSS support. First, contrary to the impression conveyed by NYT, NYT's EIF is a NYNEX-specific, non-standard interface that NYNEX has only proposed for consideration as a messaging protocol to industry bodies. Hou, p. 23; Miller, ¶ 7; Spivy, ¶¶ 43-46; Tr. 424-425 (Spivy); Tr. 433 (Nelson). In fact, one of those bodies, the Electronic Communications Implementation Committee of the Alliance for Telecommunications Industry Solutions ("ATIS"), recently rated NYT's EIF last among five types of managing protocols that had been proposed. Hou, p. 23; Spivy, ¶ 45; Tr. 424-25 (Spivy). The non-standard nature of EIF makes it undesirable, especially to larger competitors. Hou, pp. 23-24; Tr. 424-425 (Spivy); Tr. 433 (Nelson).

Moreover, EIF does not permit real-time access to NYT's OSSs, because of the way it transfers files electronically between NYT and the CLEC. Miller, ¶ 7. This transfer is insufficient for CLECs, who need information while a customer is on the line. Spivy, ¶ 42.

Most fundamentally, the experience of Community Telephone, the only CLEC that uses EIF, demonstrates that the EIF interface does not provide commercially reasonable OSS support. See NYT's Response to Staff-NYT-1.1; Kennedy, p. 4; Tr. 397

(Kennedy). In addition to the lengthy response times and delays caused by human intervention discussed above, Community Telephone has experienced numerous problems in its use of EIF, including:

- o NYT has made changes to the EIF specifications on at least three occasions, without notifying Community Telephone in advance, which have disrupted Community Telephone's operations. Kennedy, pp. 17-18; Tr. 450-451 (Kennedy); Tr. 449-450 (Miller).
- o EIF is not fully operational and accessible during the hours that NYT has said that it would be available. Kennedy, pp. 18-20.
- o EIF does not enable a CLEC to view a CLEC's service order, as entered into the NYT system, to check for errors. Kennedy, pp. 24-26.
- o EIF does not give CLECs access to information about the status of field service orders for installation of service. Kennedy, pp. 26-28.
- o NYT rejects any transaction from a CLEC that lacks a billing telephone number ("BTN"), but unlike NYT retail representatives, CLEC representatives do not have access to the database that sets forth the BTNs of NYT's customers. Kennedy, pp. 21-24; Tr. 396 (Kennedy). Moreover, NYT's retail representatives can retrieve a BTN simply by entering the customer's working telephone number ("WTN") into the NYT system. Kennedy, p. 22; Tr. 397 (Kennedy); Tr. 448-49 (Miller). See also Nelson, ¶ 11; Tr. 434 (Nelson).
- o NYT's system cannot distinguish between its own retail customers and resellers' customers. Thus, Community Telephone customers still receive mass mailings addressed to NYNEX customers, and receive follow-up calls from NYT asking whether the customer is satisfied with the "NYNEX service" that they received. NYT has also suspended the service of Community Telephone customers without notifying either the CLEC or its customers. Kennedy, pp. 34-38; Tr. 439-40 (Kennedy).⁵²

⁵²Similarly, MCI, which has tested EIF, testified that despite a great deal of effort on its part, MCI has had great difficulty in even obtaining connectivity on a test basis to EIF. Spivy, ¶ 43.

These problems substantially impair a CLEC's ability to compete. Kennedy, pp. 17-20, 22-25, 27, 35-38.

NYT does not dispute the existence of these problems on the EIF, but it has not corrected them either. In some cases NYT has refused to take corrective actions; in others, NYT has simply made promises or has provided solutions that have proven inadequate. See Kennedy, pp. 15, 20, 24, 28, 33-34, 36, 38; Tr. 440 (Kennedy). Plainly, EIF is not commercially ready for use by CLECs today. Spivy, ¶ 43-46.

iii. EDI

EDI, as the industry standard, is the interface that AT&T and some other CLECs would prefer to use for ordering. Hou, p. 24. EDI is needed by large CLECs such as AT&T and MCI in order to offer service on a commercially available basis. Tr. 421-22 (Spivy). EDI, however, is not commercially available at the present time -- as evidenced by the fact that, despite all of the problems with NYT's Web/GUI and EIF, no CLEC currently uses EDI. Tr. 380, 382, 384 (Miller); Response of NYT to Staff-NYT-1.1.

In February 1997, NYT reached agreement with AT&T to use the EDI interface for pre-ordering, ordering, and provisioning for both resale and UNEs in the future. Halloran, pp. 14-15; Hou, p. 32.⁵³ The exact date on which EDI will

⁵³As the affidavit of Mr. Miller indicates, prior to this agreement, NYT had been willing to use EDI only for certain resale service ordering transactions. Miller, ¶¶ 7, 9, 14.

become commercially available is uncertain, because the parties have only agreed to use EDI as a long-term solution. NYT and AT&T hope to complete the final stages of testing of the pre-ordering interface by the end of 1997. Halloran, p. 15. Even if that objective is realized,⁵⁴ however, EDI is at least eight months from being commercially available even for pre-ordering.

CLECs cannot now effectively use EDI to communicate electronically with NYT's internal systems because the documentation that NYT has issued for this interface, including NYT's explanation of its business rules, has been riddled with inconsistencies and omissions.⁵⁵ Because of these problems, no CLEC can currently build systems that would reliably interface with NYT's EDI. Hou, pp. 24-25; Tr. 401-02 (Hou); Tr. 418-19, 421 (Spivy); see also Spivy, ¶ 59. Although AT&T has attempted to resolve the inconsistencies and omissions in the EDI documentation with NYT on numerous occasions, substantial areas remain unresolved. Hou, pp. 28-31.⁵⁶

⁵⁴Achievement of the December 1997 target date is now questionable, given recent indications by NYT that its business rules for UNEs will be different from those governing resale. Tr. 471-72 (Halloran).

⁵⁵As Mr. Miller testified, business rules "must be adhered to for the ordering process to complete successfully." Miller, ¶ 13.

⁵⁶There are also questions whether the EDI "offered" by NYT is commercially reasonable. Testimony in this proceeding suggests that NYT's home-grown version of EDI is not the most current version. If such is the case, CLECs are likely to incur substantial costs in conforming the interfaces to the most current version, particularly if LECs in other states use more current versions of EDI. Spivy, ¶ 59; Tr. 437 (Nelson).

For these reasons, access to NYT's OSSs is not currently available to resellers on a nondiscriminatory, commercially reasonable basis.⁵⁷

b. **NYT Has Refused To Allow Resellers To Submit "Migration As Specified" Orders.**

A "Migration As Specified" order is a simple order that provides customer identifying information and references only the services that a CLEC wishes to purchase in order to serve that individual customer. In essence, this enables a CLEC to send an order that is based on the exact "menu" of incumbent LEC services it wishes to offer, and it only requires the CLEC to identify and have knowledge about those services that it wants to resell to the customer. Hou, pp. 35-36; Spivy, ¶ 72.

Migration As Specified orders are particularly important in providing service to multiline business customers and to high-end residential customers who purchase numerous optional services -- market segments in which competition is initially expected to be most intense. Hou, pp. 35-36. Such orders are also important to enable resellers to handle

⁵⁷Although NYT asserts that it also offers a protocol known as Network Data Mover ("NDM") as an alternative to the DCAS gateway for accessing certain NYT OSS functions (Miller, ¶ 8), the evidence shows that NDM simply does not work. See Tr. 468 (DeJoy, describing TCG's attempts to make NDM work as a "very painful effort"). Moreover, although Mr. Miller asserted in his affidavit that "certain" UNEs can be ordered through NDM (Miller, ¶ 14), he acknowledged at the conference that "the NDM process is not planned to be used for unbundled loops," and he did not specify which UNEs are available through NDM. Tr. 381 (Miller). In any event, the NDM falls far short of true parity for CLECs. Spivy, ¶ 76.

transactions where a customer is willing to "take a chance" on the reseller but is only willing to have the reseller provide only a part of its service.

Industry standards provide a means for incumbent LECs to accept Migration As Specified orders for resold services. In fact, it appears that most RBOCs, including Bell Atlantic, have agreed to accept such orders. Hou, pp. 35-36; Spivy, ¶ 72; Nelson, ¶ 9. AT&T's systems were therefore designed to conform to such standards. Hou, p. 35.

In contrast to other RBOCs, however, NYT has been unwilling to allow resellers to submit Migration As Specified Orders. Instead, NYT has insisted that resellers' orders for resale customers must identify both the services that the customer is ordering in its new relationship with the reseller, and the services that the customer was then purchasing from NYT that the reseller did not intend to resell. Hou, p. 36; Spivy, ¶ 72; Nelson, ¶ 9.

This requirement is both discriminatory and commercially unreasonable. Unlike NYT, resellers will be required to maintain two lists of products and services within its own systems: (1) the reseller's own internal list of the incumbent LEC services that it wishes to offer for resale to customers; and (2) the list of all the services that NYT offers, which today includes over 30,000 Universal Service Order Codes ("USOCs"), regardless of whether the reseller intends to offer

such services. Hou, pp. 37-38; Nelson, ¶ 10; Spivy, ¶ 72; Tr. 426-428 (Spivy); Tr. 431-432 (Hou); Tr. 436 (Nelson).

Since NYT first indicated last October that it would not accept Migration As Specified orders, AT&T has engaged in negotiations with NYT in an attempt to resolve the issue. In January 1997, in response to a proposal from AT&T, NYT expressed a willingness to process such orders, but only on a manual and interim basis, and subject to a charge of \$8.28 per exchange line/order -- a charge for which NYT offered no TELRIC-based cost support. Hou, pp. 39-40. In February 1997, AT&T and NYT worked out a compromise, which NYT is still investigating for feasibility. *Id.*, p. 40.⁵⁸ Unless and until NYT is willing to accept Migration As Specified orders, it cannot claim that it is making resale available on just, reasonable, and nondiscriminatory terms and conditions.

c. NYT Has Refused To Accept Changes To Service Orders From Resellers Before It Responds To the Original Service Order.

After a customer has placed an order with a reseller, but before the order has been implemented, the customer may call the reseller back to request changes. Unless the reseller is able to enter such modifications into NYT's system as soon as they are received, customers may receive services they do not

⁵⁸It appears that AT&T and NYT may have reached an agreement in principle on this issue in recent days, but even if this matter is resolved, there are no written procedures relating to Migration As Specified and no evidence that NYT can carry out this requirement.

want, or will not receive the services they expect. In such circumstances, the customer will blame the errors on the CLEC, not on NYT. Hou, p. 41; Spivy, ¶ 73.

NYT, however, refuses to accept changes to resellers' service orders between the time they were received and the time they are fully implemented into NYT's systems. This period could be as much as 24 hours. Thus, NYT does not guarantee to send a CLEC a Firm Order Commitment ("FOC") in less than 24 hours. Hou, p. 40; Spivy, ¶ 73; Tr. 406 (Hou); Tr. 493-494 (Miller).

NYT's practice is discriminatory. When a NYT retail customer calls to change a recently-placed service request, a NYT representative can modify the order while it is still being processed in NYT's systems. Hou, p. 41; Kennedy, pp. 32-33; Spivy, ¶¶ 73; Tr. 406 (Hou). Thus, NYT's practice creates risks of errors, delay and customer dissatisfaction in the provision of service to CLEC customers that do not exist with respect to NYT's own customers. Spivy, ¶ 73.

Although NYT has indicated in recent discussions that it plans to return Firm Order Confirmations ("FOCs") more promptly as it increases the number of orders that are processed in a fully automated manner, it has not made any formal commitments on this subject, much less documented its ability to return FOCs in a timely manner. Hou, p. 42; Tr. 493-94 (Miller). Furthermore, although NYT has previously stated that it intends to correct the problem by the end of 1997, it "does not regard this as a priority item." Kennedy, p. 33. Thus, it is also

unclear when, or whether, NYT will ever apply fully automated processing to all orders. Hou, p. 42. Indeed, NYT's discriminatory practice may well continue indefinitely.

B. UNBUNDLED NETWORK ELEMENTS ARE NOT BEING PROVIDED IN A MANNER THAT ALLOWS REQUESTING CARRIERS TO COMBINE THE ELEMENTS IN ORDER TO PROVIDE TELECOMMUNICATIONS SERVICE.

NYT has not demonstrated that its network elements are being provided in a manner that allows CLECs to combine the elements to provide telecommunications service. Although NYT states that it will allow requesting carriers to combine elements (Garzillo, ¶¶ 54-56, Butler, ¶¶ 72-75), NYT has not provided information or established the procedures needed to permit CLECs to order combinations of unbundled elements. Moreover, contrary to NYT's representations, it has told requesting carriers that it will not accept orders for combinations of elements. Marzullo, ¶ 26.

NYT's systems are presently incapable of handling requests for combinations of elements. As a result, each unbundled element must be ordered individually, which increases the risk of error in the provisioning of the order. Halloran, p. 16; Marzullo, ¶¶ 23-24. This inability to process combinations also imposes additional burdens on CLEC OSS systems as the CLECs have to track the status of the individual elements rather than a single order that contains multiple elements ordered in tandem.

NYT also fails to provide necessary information on UNE combinations. NYT's mere statement that combinations of elements

are "available" is inadequate, and the SGAT does not even contain a list of combinations that NYT is proposing to make generally available, including the unbundled network element platform. Without such a listing, CLECs cannot know what they can obtain from NYT. Marzullo, ¶ 24. Moreover, CLECs need detailed listings of combinations that NYT will make available and information on how to order those combinations. Id.

The SGAT states that the BFR process will apply to any combination that differs from the manner in which NYT configures its network elements in existing services. SGAT § 5.10.2. The Butler affidavit goes further and appears to indicate that the BFR process will apply to all combinations of elements. See Butler, ¶¶ 73-74. The BFR process, however, should be necessary only in the rare situation where there is a genuine question about the technical feasibility of a proposed combination, and it is not appropriate in other instances. Halloran, p. 3.

C. NYT'S PROPOSED USE OF THE BONA FIDE REQUEST PROCESS IS NOT CONSISTENT WITH THE ACT.

The use of the BFR process that NYT proposes is not consistent with the requirements of the Act. NYT apparently plans to use the BFR process as a standard means of dealing with CLEC requests, including, for example, requests for interconnection at any technically feasible point and unbundling of technically feasible elements. Marzullo, ¶ 8. The BFR process should be limited, however, to truly unusual or novel

situations in which there is a genuine issue as to technical feasibility. Halloran, p. 3; Marzullo, ¶ 8.

In addition, the BFR process must be strictly defined because it allows NYT substantial discretion to hinder CLECs seeking to offer competitive services. Any request subjected to the BFR process takes months to resolve, and such delays impose competitive hardship on CLECs, who often will have customers that cannot receive service until the BFR process is complete. It also obviously gives NYT an incentive to delay resolution of any matter that is subject to the BFR process.⁵⁹ Unnecessary delays caused by NYT's BFR process would create discrimination that would have a disastrous competitive impact on CLECs.

Finally, NYT should not be permitted to use the BFR process to shift the burden of proof on issues of technical feasibility. NYT has proposed use of the BFR process in a number of instances in which it states that it must make a determination of whether some CLEC proposal is technically feasible. If NYT determines that such proposal is not technically feasible, it states that it will notify the CLECs of its determination. SGAT, § 16.5. After NYT has made its determination, however, it still bears the burden of demonstrating to this Commission, on the basis of clear and convincing evidence, that the CLEC proposal is not technically feasible.

⁵⁹AT&T has provided a number of examples of situations in which NYT has taken months to act on AT&T requests (e.g., the local services trial and interim number portability). See Halloran, pp. 6-10, 24-35.

III. LEGAL ISSUES REGARDING INTERPRETATION AND APPLICATION OF SECTION 271

a. NYT Fails to Meet the Requirements of Section 271(c).

Section 271(c) reflects Congress' judgment that a BOC may not offer in-region long distance service unless and until the BOC's monopoly control over local exchange facilities is broken. The enforcement of this section is essential both to the protection of the existing vigorous long- distance competition and to enable genuine local-services competition. To this end, Section 271(c) requires the BOC to establish that there exists a meaningful facilities-based alternative to the BOC's monopoly, and more particularly, that the BOC satisfies a fourteen-point competitive checklist. As shown below, NYT makes a mockery of this requirement by contending that today in New York there are meaningful facilities-based competitors providing service to residential and business customers.

Section 271(c)(1)(A) ("Track A") was designed by Congress to be the principal method for a BOC to demonstrate checklist compliance -- through the implementation of actual agreements with real competitors.⁶⁰ The Act requires that BOCs satisfy the requirements of Track A whenever CLECs have timely requested and pursued interconnection arrangements with the BOC. Track A requires findings, inter alia, that there are

⁶⁰ The House Committee Report called Track A "the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition." H.R. Rep. No. 204, 104th Cong., 2d Sess. 77 (1996).

predominantly facilities-based "competing providers" serving residential and business customers in the state for which the BOC seeks in-region interLATA authorization (§§ 271(c)(1)(A) & (d)(3)(A)) and that the BOC has entered into interconnection agreements under which it is providing and has fully implemented all items of the competitive checklist. 47 U.S.C. §§ 271(c)(2) & (d)(3). Thus, as the method based on actual interconnection agreements, Track A was designed to be the primary means for a BOC to show that there exists meaningful facilities-based competition.

Track B, in contrast, was designed as a highly limited exception in the unlikely event that no provider had requested interconnection. In that eventuality, a BOC can seek approval from the FCC to provide in-region interLATA authority for a state by demonstrating, inter alia, that it has "offer[ed]" all checklist items through a statement of generally available terms and conditions that had been approved by the state commission. See §§ 271(c)(1)(B), (c)(2) & (d)(3)(A)(ii). This exception responds to a specific argument that the Bell Companies made to Congress: that all potential CLECs might somehow conspire to refuse to enter the local exchange market in order to prevent the Bell Companies from ever receiving interLATA authority. As AT&T, MCI, and other CLECs have requested interconnection agreements from NYT covering all the checklist items, that concern is not an issue in New York.

Whether the BOC uses Track A or the more unusual Track B, Section 271(c) (2) requires that the BOC provide pursuant to an approved agreement (or an "offer" in an SGAT) each of the fourteen items contained in the statute's competitive checklist. 47 U.S.C. § 271(c) (2) (B).

NYT argues that it meets the requirements of Section 271(c) (1) through "mixing and matching" Track A and Track B, or, alternatively, through Track B. NYT is wrong on both counts. Track B is unavailable to NYT, and BOCs cannot "mix and match" Tracks A and B.

(i) NYT's Reliance on Its Statement of Generally Available Terms (SGAT) to Meet Section 271 Is Inconsistent With the Act.

NYT cannot rely on its SGAT for two reasons: First, NYT cannot rely on its SGAT to meet Section 271 because providers have requested interconnection agreements covering all the checklist items. Second, in order for NYT to rely upon its SGAT, it must be approved by this Commission under Section 252(f), and this Commission should reject the SGAT.

Under Track B, a BOC can rely on a state commission-approved SGAT. A BOC, however, may avail itself of the Track B option only if it can show, ten months after passage of the 1996 Act, that "no such provider has requested the access and interconnection described in subparagraph (A) before the date

which is 3 months before the date" that the BOC submits its application. 47 U.S.C. § 271(c)(1)(B) (emphasis added).⁶¹

⁶¹ The statutory provisions containing Track A and Track B are 47 U.S.C. §§ 271(c)(1)(A) & (B):

INTERLATA SERVICES-

(1) AGREEMENT OR STATEMENT. -- A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR. -- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service as defined in section 3(47)(A), but excluding exchange access to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) FAILURE TO REQUEST ACCESS. -- A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f). For purposes of this subparagraph, a Bell operating

(continued...)

NYT argues that "the statutory requirements would be met by the Statement of Terms and Conditions alone," NYT Br. at 21, notwithstanding the fact that numerous CLECs have requested interconnection agreements in order to offer competitive local exchange services in New York. According to NYT, the Track B requirement that "no such provider" has requested an interconnection agreement means that no agreement has been sought by a "competing provider of telephone exchange service to residence and business customers, predominantly or exclusively over its own facilities" as set forth in the second sentence of Section 271(c)(1)(A). NYT Br. at 16. By NYT's logic, Track B is available until interconnection and access are requested by facilities-based providers.⁶²

This reading turns the Act on its head. The phrase "no such provider" in Section 271(c)(1)(B) is most naturally read to refer to the same entities described in the phrase "such competing providers" in the second sentence of

⁶¹(...continued)

company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

⁶²NYT's position that it can satisfy the statute with its SGAT would mean, perversely, that the further a BOC is from facing facilities-based competition in a State, the easier it would be for that BOC to obtain interLATA authority.

Section 271(c)(1)(A) -- a phrase that refers to the "unaffiliated competing provider" described in the first sentence of Section 271(c)(1)(A). Unaffiliated competing providers include AT&T, the other IXCs, and all the CLECs.

In contrast, NYT's proposed source of the term "such provider" -- the predominance requirement found in the second sentence of Section 271(c)(1)(A) -- is explicitly applicable only "for purpose of this subparagraph," i.e., for purposes of Track A. Track B, therefore, plainly cannot be invoked when there are carriers who satisfy the first sentence of subparagraph A, but not the second sentence.

Further, NYT's contention that it may invoke Track B in the absence of a competing, facilities-based provider ignores that Track A and Track B look at very different points of time in the competitive process. Track A examines the competitive situation after a CLEC has requested access and interconnection, negotiated or arbitrated an interconnection agreement, and begun providing service. It then asks whether that service is provided to business and residential customers and whether the service is predominantly or exclusively over the CLEC's own facilities. By contrast, Track B looks at a far earlier point in time -- when CLECs make their initial requests that begin the negotiating period -- and asks simply whether such requests have been made. At the time a request is made, there will often be no way to know whether the CLEC will ultimately be providing service

predominantly over its own facilities. The applicability of Track B, therefore, cannot possibly turn on that question.

NYT also suggests that Track B (or a combination of Track A and B) must be available immediately because Congress meant for the BOCs to offer in-region interLATA service without delay. NYT Br. at 17-19. Congress, however, clearly contemplated that the BOCs would not be able to immediately offer in-region interLATA service, i.e., that neither track might be available to a BOC. This conclusion is supported by the two statutory exceptions that make Track B available in the event of (1) a CLEC's failure to negotiate an agreement in good faith or (2) a CLEC's failure (once an agreement had been executed and approved) to comply with the "implementation schedule" within a reasonable period of time. 47 U.S.C. § 271(c)(1)(B). Congress would not have created such exceptions if one track or the other is always available.

These exceptions quite clearly show that Congress intended that Track B would not be available to a BOC where -- as in New York -- there is not yet a competing exchange service provider that satisfies the first or the second sentence of subsection (c)(1)(A). Here, competing providers have timely requested interconnection and access arrangements from NYT under a schedule that can realistically lead to the construction or use of alternative facilities that will satisfy subsection (c)(1)(A)'s "predominantly-over-its-own-facilities" requirement. If Congress had not intended to bar the use of Track B in such

cases, there would have been no reason for it to adopt a provision that would make Track B available in the event of a lack of CLEC's good faith negotiating or timely compliance.⁶³

Second, NYT seeks approval of its SGAT even though competitive checklist items are not actually available. See p. 3 supra (checklist items that NYT cannot provide). The statute requires that NYT "generally offer[]" terms and conditions for access and interconnection. § 271(c)(1)(B). The Georgia Commission refused to approve Bell South's SGAT because some competitive checklist items were not actually available: "'Generally offering' terms and conditions is meaningless if the offer is on paper only, without the capability to provide the actual service." Ga. SGAT Decision, at 9. "[A]pproval of the Statement under these conditions would be misleading by stating that [the BOC] 'generally offers' items that are not actually available." Id. at 8. "The Statement should not be approved so long as [the BOC] has not demonstrated that it is able to actually provision the services of interconnection, access to unbundled elements, and other items listed in the Statement and required under Sections 251 and 252(d)." Id. Similarly, this Commission should refuse to approve NYT's SGAT and prevent NYT from relying on a paper offer.

⁶³In this regard, the negotiation and implementation schedule this provision refers to is the schedule for obtaining interconnection, access, collocation, and related arrangements from the ILEC. A CLEC's construction or use of alternative facilities is not a possible or proper subject for "agreement" with the incumbent LEC under Section 252.

In sum, NYT cannot rely on a Track B approach because many unaffiliated competing providers, including AT&T and other IXC's, have requested interconnection agreements that cover all the items in the competitive checklist. The statute clearly provides that requests from carriers such as AT&T bar NYT from relying upon Track B.

(ii) Section 271 Does Not Allow NYT to "Mix and Match" Checklist Items from Interconnection Agreements and the SGAT.

According to NYT, a BOC can "meet the requirements of the competitive checklist by relying on provisions contained in . . . a combination of one or more interconnection agreements and a Statement of Terms and Conditions." NYT Br. at 15. To support this position, NYT relies on legislative history and the speculative argument that Congress could have meant "and" when it repeatedly wrote "or." NYT Br. at 15-20. These arguments simply ignore the statute's explicit and unambiguous language.

The provisions relevant to this issue are Sections 271(c)(2)(A), 271(c)(2)(B), and 271(d)(3)(A). Section 271(c)(2)(A) provides:

A [BOC] meets the requirements of this paragraph if, within the State for which the authorization is sought

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(i) (I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in subparagraph (1)(B), and

(ii) such access and interconnection meets the requirements of [the competitive checklist].

(emphasis added). Similarly, Section 271(c)(2)(B) requires a BOC to satisfy the competitive checklist with respect to access and interconnection that is either "provided or generally offered" (emphasis added). Section 271(d)(3)(A) likewise provides:

Determination. -- Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that --

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) and --

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has fully implemented the competitive checklist in subsection (c)(2)(B); or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B), such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B).

(emphasis added).

These provisions show that Congress regarded "and" and "or" as having different meanings. The repeated and consistent use of the disjunctive "or" in separating Track A and Track B makes clear that a BOC may only satisfy Section 271(c)(1) either through Track A or through Track B. A BOC may not, however, combine elements provided in binding agreements under Track A with items contained in statements of generally available terms filed under Track B.

NYT argues that unless it is allowed to "mix and match" interconnection agreements with a statement, "vested interests" would be permitted "to manipulate the regulatory process for the purpose of delaying competition, by either failing to execute any agreement, or executing agreements which did not request all the checklist items." NYT Br. at 18. The short answer to this claim is that it is foreclosed by Section 271's plain terms. Congress quite plainly recognized that each of the items in the checklist is an essential input for the provision of competitive local exchange services, and that in any situation in which CLECs request interconnection and access (such that Track B cannot be invoked), all checklist items will be sought by CLECs. Indeed, AT&T, MCI, and other CLECs have requested all checklist items from NYT.

The mutual exclusivity of Track A and Track B is sound public policy. If NYT were permitted to use an SGAT to cure its non-compliance with the checklist, NYT could frustrate the purpose of Track A's "providing" requirement⁶⁴ by withholding agreement on one or more items on the checklist and using the SGAT to avoid any inquiry into its actual provision of the item. Thus, just as Track B protects the BOCs against their assertion that the long distance companies would hold back, the mutual exclusivity of Track A and Track B protects against the long distance companies' fear that the BOCs would enter the long

⁶⁴The "providing" requirement is found in Section 271(c)(1)(A) and reiterated in Section 271(c)(2)(A)(i)(I).

distance market without actually providing the checklist requirements.

In all events, it appears that the "mix and match" issue may soon be moot as NYT and AT&T have been directed by the Commission to execute their interconnection agreement, which covers all fourteen checklist items, by early May. Upon approval of that interconnection agreement by the Commission, NYT would no longer need to rely upon its "mix and match" approach.

b. NYT Is Not "Providing" Access and Interconnection as Required Under the Statute.

NYT argues that it "meets the requirements of the Act by offering each checklist item. Availability of each checklist item is the proper criterion, even if not every item has yet been ordered by a competitor." NYT Br. at 22 (emphasis added). This assertion misstates the relevant test under Section 271.

Section 271 expressly states that, with respect to Track A, the BOC must demonstrate that the access and interconnection covered in an agreement with a competitor must actually be "provided," and that such access must include "each" of the elements of the competitive checklist. 47 U.S.C. §§ 271(c)(2)(A)(i)(I), 271(c)(2)(B) (emphases added).⁶⁵ Indeed,

⁶⁵The Conference Report states that the CLECs must be providing the checklist items: "The requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational. This requirement is important because it will assist the appropriate State commission in providing its consultation and in the explicit factual determination by the Commission under new

(continued...)

Section 271 repeatedly distinguishes between the Track A requirement that, where carriers have requested access and interconnection, all checklist items be "provided," and the Track B requirement that, where no carrier has requested access and interconnection, all checklist items be "offered" and "available."⁶⁶ That a BOC must actually provide each of the checklist items under Track A is further confirmed by Section 271(d)(3)(A)(i), which requires that the FCC, before granting a BOC's application, find, "with respect to access and interconnection provided pursuant to [Track A]," that the BOC has "fully implemented" the competitive checklist. Accordingly, to satisfy Track A, a BOC must demonstrate not merely that it has included the checklist items in an agreement, but that it is in

⁶⁵(...continued)
section 271(d)(2)(B) that the requesting BOC has fully implemented the interconnection agreement elements set out in the checklist under new section 271(c)(2)." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 148 (1996).

⁶⁶Compare § 271(c)(1)(A) (stating that Track A requires an agreement under which the BOC "is providing access and interconnection") with § 271(c)(1)(B)) (requiring, as part of Track B, a statement that "generally offers to provide such access and interconnection"); § 271(c)(2)(A)(i)(I) (providing that the BOC must be "providing access and interconnection pursuant to one or more agreements described in paragraph 1(A)") with § 271(c)(2)(A)(i)(II) (stating that a BOC must be "generally offering access and interconnection pursuant to a statement described in paragraph 1(B)"); Compare also § 271(d)(3)(A)(i) with § 271(d)(3)(A)(ii).